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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Southwestern Bell Telephone Company,)
Pacific Bell, and Nevada Bell Petition for Relief)
from Regulation Pursuant to Section 706 of the)
Telecommunications Act of 1996 and 47 U.S.C.)
§ 160 for ADSL Infrastructure and Service)
)

CC Docket No. 98-91

COMMENTS OF BELLSOUTH

BellSouth Corporation and BellSouth Telecommunications, Inc. ("BellSouth"), pursuant to the Public Notice, DA 98-1111, released June 11, 1998, hereby Comment on the Petition of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell (the "SBC LECs") for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. § 160 for ADSL Infrastructure and Service.

I. Introduction

In their Petition, the SBC LECs ask the Commission for relief from regulatory obligations and burdens associated with the provision of Asymmetrical Digital Subscriber Lines ("ADSL"), a form of broadband capability. The SBC LECs base their Petition for relief on Section 706 of the Telecommunications Act of 1996 (1996 Act) and 47 U.S.C. § 160.¹ BellSouth concurs that the Commission should grant the necessary regulatory relief sought in the Petition along with any other relief that is needed to allow Incumbent

¹ Petition of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. § 160 for ADSL Infrastructure and Service (filed June 9, 1998) ("SBC LECs' Petition" or "Petition") at 5-6.

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Local Exchange Carriers ("ILECs") to provide ADSL to customers in a competitive market place.

II. Market Place Dynamics

The need for the rapid deployment of high-speed data applications such as ADSL is undisputed. Confirmation of this fact can be found by simply logging on to the Internet. "The Internet used to double in size once a year, but now it's doubling every three to six months—a tenfold increase per year."² No longer are Internet users content on accessing data at conventional speeds. They have become sophisticated in their use, and need, for high-speed data retrieval. Such speed cannot be obtained through the use of dial-up modems. Alternative options for high-speed access, such as ADSL, must be developed. The market place is witness to such demand.

As the SBC LECs' Petition states, alternate high-speed access methods are already available to consumers at a price and speed that are at least equal to their ADSL offering.³ Furthermore, other methods are emerging in a developing market. For example, one method is Cable Modem service that uses a cable company's coaxial cable to send and receive data.⁴ Moreover, there are a growing number of potential alternate providers of ADSL.⁵ The entities that provide these high-speed access methods do so without the regulatory restrictions—the very restrictions from which the SBC LECs seek relief—that are placed on ILECs. This is patently unfair considering that the ILECs do

² Jeff Sweat, *Internet Demand Is Moving Faster Than Technology, Panel Says*, INFORMATION WEEK (March 16, 1998), available at <http://www.techweb.com.wire/story/0398iwld/TWB19980316S0017>.

³ SBC LECs' Petition at 10.

⁴ *Id.* at 11–14.

⁵ *Id.* at 15–17.

not represent a monopoly in this market. Indeed, even if the Commission forbears on regulation and the ILECs enter the market, they do so with “zero market share competing against pre-existing high-speed data services offered by entities that have no comparable regulatory oversight and thus much greater flexibility.”⁶

III. All Regulatory Roadblocks to the Deployment of ADSL Should Be Removed.

The SBC LECs’ Petition lists four specific areas of regulation that present potential barriers to the provision of ADSL. First, the Petition seeks relief from any unbundling obligations of § 251(c)(3), assuming that any such obligations apply.⁷ Second, the Petition seeks relief from any wholesale discount obligations that may be required by § 251(c)(4), once again assuming any such obligations apply.⁸ Third, the SBC LECs ask the Commission for forbearance on dominant treatment of ADSL service including applicable tariff requirements.⁹ Finally, the SBC LECs seek forbearance from the “most favored nations” obligations of § 252(i).¹⁰ The Commission should not stop there, but should instead seek to locate and remove any regulatory barrier that impedes the development of innovative technologies.

⁶ SBC LECs’ Petition at 11.

⁷ The Commission’s orders regarding whether unbundling and resale obligations of § 251(c) apply to data networks, including those that provide ADSL services, are inconclusive. Indeed BellSouth argues in these Comments for the Commission to definitively determine that such obligations do not apply to the new technologies that are developed to provide advanced data services such as ADSL. *See infra* Section III. The SBC LECs recognized the ambiguity surrounding the Commission’s orders on this matter, and thus their Petition seeks forbearance from unbundling and resale obligations only if such regulations apply.

⁸ *See supra* note 7.

⁹ SBC LECs’ Petition at 32.

¹⁰ *Id.* at 5–6.

A. Unbundling and Wholesale Restrictions

Simple economics have long recognized a cause and effect relationship between risk and reward. The unbundling and resale, with wholesale discounts, requirements of § 251, however, place the ILEC in a position of taking all the risks associated with developing new technologies, and bearing all the costs of the unsuccessful ventures, yet sharing with its competitors the rewards of the successes. Requiring an ILEC to share its rewards with its competitors inhibits its incentive to develop and deploy new technology. This is contrary to the purpose and intent of § 706. As the SBC LECs' Petition recognized, the Commission has acknowledged "that prohibiting incumbents from refusing access to proprietary [network] elements could reduce their incentives to offer innovative services."¹¹ This position was confirmed by Commissioner Powell in a recent speech where he said that, "Policymakers must be careful not to allow anti-discrimination or other policies to foreclose the ability of firms to benefit from their own innovations."¹²

The Commission has the ability to interpret § 251 in a manner that will promote the policy goals stated in § 706. The language in § 251(c) is silent on whether the obligations imposed therein apply to the ILEC networks only as those networks existed when the 1996 Act became effective, or to new technology deployed subsequent to that date as well. In the Interconnection Order, the Commission did not decide whether

¹¹ SBC LECs' Petition at 26, quoting *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15499, ¶ 282 (1996), *vacated in part on other grounds*, Iowa Utilities Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), *amended on reh'g*, 1997 U.S. App. Lexis 28652 (October 14, 1997), *cert. granted sub nom*, 66 U.S.L.W. 3490 (1998).

¹² Speech of Commissioner Michael K. Powell, Before the Legg Mason Investor Workshop, TECHNOLOGY AND REGULATORY THINKING -- ALBERT EINSTEIN'S WARNING, (March 13, 1998).

§ 251(c) extends to new network technologies.¹³ The Commission is thus now free in this proceeding to interpret § 251 in a manner consistent with § 706, and determine that § 251(c) applies only to an ILEC's network as that network existed when the 1996 Act became effective.¹⁴ In doing so, the Commission would promote competition and encourage innovation by permitting ILECs to retain the benefits of new technologies introduced into their networks.

With respect to unbundling, the Commission also has the discretion, under § 251(d)(2),¹⁵ to determine what network elements should be unbundled. When read *in pari materia* with § 706(a), the Commission could find that an ILEC is not required to provide unbundled access to its high-speed, advanced broadband services such as ADSL, so long as the ILEC continues to make available the underlying network elements, e.g., conditioned ADSL loops. This is exactly what the SBC LECs propose to do. Indeed, they plan to offer ADSL compatible loops on a non-discriminatory basis to whoever

¹³ See, e.g., *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Providers*, 11 FCC Rcd 15499, 15722, (1996) ("Interconnection Order"), ("In this section, for example, we expressly limit the provision of unbundled interoffice facilities to *existing* incumbent LEC facilities.") (emphasis in original); and ¶ 15713 ("At this time, we decline to find...that incumbent LEC's packet switches should be identified as network elements.")

¹⁴ The Commission gave virtually no consideration to the requirements of Section 706 in the Interconnection Order. The Commission buried Section 706 at the end of its discussion of Section 251 in two short sentences: "We decline to adopt rules regarding Section 706 in this proceeding. We intend to address issues related to Section 706 in a separate proceeding." *Interconnection Order*, ¶ 16121.

¹⁵ 47 U.S.C. §251(d)(2) provides as follows:

In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

wishes to purchase them.¹⁶ Additionally, they have committed to collocate any other ADSL equipment, e.g., the Digital Subscriber Line Multiplexer (“DSLAM”), on their facilities.¹⁷ This will ensure that any competitor would have access to the consumer and eliminate any perceived “bottleneck” problem over access facilities. Accordingly, the Commission should forbear from any regulation regarding unbundling and wholesale discounts associated with ADSL.

B. Relief from Dominant Treatment

Clearly the Commission has the authority, pursuant to 47 U.S.C. § 160, to forbear dominant treatment of ADSL services. Moreover, the SBC LECs’ Petition establishes that the relevant standard has been met and that such forbearance is warranted.

The underlying need for the regulatory requirements associated with dominant treatment of a service is to protect the consumer when natural market forces fail to do so, i.e., one entity has monopoly power over that service. Such protection is unnecessary with ADSL because no entity, including ILECs, has monopoly power over this service. The SBC LECs’ Petition illustrates the competition, and the threat of potential competition, that exists in this young market. This is especially true with cable modems, their potential is unlimited considering the number of homes cable reaches. As the market matures more competitors will enter. If the ILECs want to compete, the competitive market will be their regulator. Accordingly, it would be unjust to saddle the ILECs with the regulatory burdens of dominant treatment in the ADSL market, and the Commission should forbear from such regulation.

¹⁶ SBC LECs’ Petition at 19–20.

¹⁷ *Id.* at 20–21.

C. Relief from “Most Favored Nations” Requirements

BellSouth agrees with the SBC LECs’ Petition that the Commission has authority and should forbear enforcement of 47 U.S.C. 252(i). BellSouth is hopeful that the Commission will grant the other relief sought by the SBC LECs’ Petition in a timely manner thereby rendering this issue moot. In the event, however, such relief is delayed, forbearance from 47 U.S.C. § 252(i) may be needed and, as established in the SBC LECs’ Petition, would be justified.

While the issues raised by the SBC LECs’ Petition are particularly troublesome, they are not the only regulatory restrictions with which the Commission should be concerned. BellSouth does not intend in these Comments to limit the issues it believes the Commission should, at some point, address. Issues such as price regulation and depreciation requirements also present significant barriers to deployment of ADSL.¹⁸ The significance of these issues should not be overlooked, and the fact that BellSouth has not addressed such issues in these Comments should not be taken as a concession that it believes the issues should not be examined.

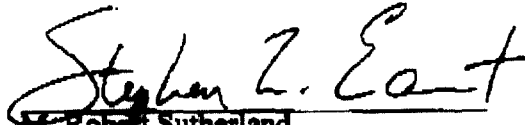
IV. Conclusion

The Commission’s mandate from Congress, enunciated in Section 706, is to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.” Such deployment is curtailed, however, because of regulatory roadblocks that create disincentives to investment. The Petition of the SBC LECs seeks to eliminate some of these roadblocks. The Commission

¹⁸ BellSouth has addressed some of these issues in more detail in its comments on the Section 706 petition of the Alliance for Public Technology, CCB/CPD docket No. 98-15 (filed April 13, 1998).

should embark upon a process that will lift the roadblocks and result in the rapid deployment of advanced telecommunications such as ADSL.

Respectfully submitted,
BELLSOUTH CORPORATION
By its Attorneys

A handwritten signature in dark ink, appearing to read "Stephen L. Earnest", written over a horizontal line.

Mr. Robert Sutherland
Stephen L. Earnest

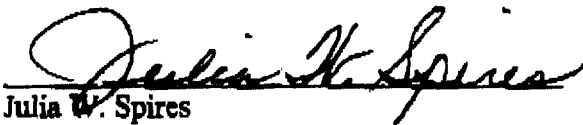
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Date: June 24, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of June 1998, serviced all parties to this action with the foregoing *COMMENTS*, reference CC Docket No. 98-91, by hand service or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties as set forth on the attached service list.


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